Office Supreme Court, U.S.
FILED
JAN 2 1964
JOHN F. DAVIS, CLERK

No. 721

IN THE

Supreme Court of the United States

October Term, 1963

UNITED STATES OF AMERICA *ex rel.*
SAMUEL TITO WILLIAMS,
Respondent,

—against—

EDWIN M. FAY, Warden of Greenhaven Prison,
Stormville, New York,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD S. SILVER
District Attorney, Kings County
Attorney for Petitioner

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

INDEX

	PAGE
History	1
Opinions Below	5
Jurisdiction	5
Question Presented	5
Applicable Constitutional and Statutory Provisions	5
Record Facts Material to the Question Presented	6
The People's Case	6
The Defense	13
People's Rebuttal	15
The Court's Charge	16
Proceedings in the New York Court of Appeals	17
ARGUMENT:	
POINT I—The petition for the writ of habeas corpus was properly denied on the merits. Respondent failed to sustain the burden of proof cast upon him by law	18
CONCLUSION	30

AUTHORITIES CITED

Cases

Ashcraft v. Tennessee, 322 U.S. 143	24
Brown v. Allen, 344 U.S. 443	21

PAGE

Culombe v. Connecticut, 367 U.S. 568 26

Darr v. Burford, 339 U.S. 200 3-4

Ex Parte Hawk, 321 U.S. 114 4

Haley v. Ohio, 332 U.S. 596 24
Haynes v. Washington, 373 U.S. 503 24

Leyra v. Denno, 347 U.S. 556 24
Lyons v. Oklahoma, 322 U.S. 596, 88 L. Ed. 1481 17

Malinski v. New York, 324 U.S. 401 28

Spano v. New York, 360 U.S. 315 24
Stein v. New York, 346 U.S. 156 ..... 19, 24

Townsend v. Sain, 372 U.S 293 22
Turner v. Pennsylvania, 338 U.S. 62 24

United States v. LaVallee, 170 F. Supp. 582 4
United States v. LaVallee, 276 F. 2d 645 4
United States ex rel. Wade v. Jackson, 256 F. 2d 7, cert. den. 357 U.S. 908 24
United States ex rel. Caminito v. Murphy, 222 F. 2d 698, cert. den. 350 U.S. 896 24

Watts v. Indiana, 338 U.S. 49 29
Williams v. State of New York, 337 U.S. 241 3

New York Statutes

Constitution of the State of New York:
Article 1, Section 6 6
Article VI, Section 7 18

Code Crim. Pro.:
Sec. 165 ..... 6, 25
Sec. 395 6
Section 482 ..... 2, 18

Penal Law, Sections 1044, 1045 and 1045-a 2, 18

PAGE

United States Constitution

Fourteenth Amendment 2, 5, 18

United States Statutes

28 U.S.C. § 1257 (2) 2
28 U.S.C. § 2101c and d 5
28 U.S.C. § 2254 5

Rules

Rule 22 of Revised Rules of Supreme Court 5

IN THE

Supreme Court of the United States

October Term, 1963.

UNITED STATES OF AMERICA *ex rel.*
SAMUEL TITO WILLIAMS,

Respondent,

—against—

EDWIN M. FAY, Warden of Greenhaven Prison,
Stormville, New York,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

EDWIN M. FAY, Warden of Greenhaven Prison, Stormville, New York, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 18th, 1963 reversing the denial of an application for a writ of habeas corpus.

History

The judgment to which the petition for the writ was addressed was entered in the County Court of Kings County,

New York, on March 2, 1948. By it respondent was convicted of the crime of Murder in the First Degree committed during a burglary in the killing of Selma Graff, a fifteen year old girl. The trial Court disregarded the jury's recommendation of clemency made pursuant to Penal Law, Section 1945-a, and sentenced respondent to be executed.

The judgment of conviction was unanimously affirmed by the Court of Appeals (298 N. Y. 803). That Court, however, certified that in so acting it had necessarily passed on the constitutional question that the sentence and the statutes on which it was based (Penal Law, Sections 1044, 1045 and 1045-a and Code Crim. Pro. Section 482) violated the Fourteenth Amendment to the Federal Constitution in that the Court had imposed the sentence under these statutes upon information supplied by persons by whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal. The Court of Appeals held that the Constitution had not been violated. The Court thereafter denied re-hearing (300 N. Y. 460).

An appeal based on this certification was allowed by the Supreme Court of the United States pursuant to 28 U.S.C. 1948 Ed. 1257 (2). The sole question passed upon by the Court was the constitutionality of the statutes as applied in the case and the practice of the sentencing Court thereunder of utilizing ex-parte information concerning the judgment. The Court affirmed the judgment (337 U. S. 241, 93 L. ed. 1337, 69 S. Ct. 1079, with an opinion by Black, J., Rutledge and Murphy, JJ. dissenting, re-hear. den. 337 U. S. 961, 69 S. Ct. 1529, 93 L. ed. 1337 and 338 U. S. 841, 71 S. Ct. 34, 94 L. ed. 514). Despite the restricted nature of the litigation before the Court, Black, J. wrote:

"The narrow contention here makes it unnecessary to set out the facts at length. The record shows a carefully conducted trial lasting more than two weeks in which appellant was represented by three appointed lawyers who conducted his defense with fidelity and zeal. The evidence proved a wholly indefensible murder committed by a person engaged in a burglary * * *.

Appellant was found guilty after a fairly conducted trial * * *."

Williams v. *State of New York*, 337 U. S. 241, at pp. 243, 252.

We shall have occasion to return to this quotation later in this petition.

The then Governor of New York Thomas E. Dewey, thereafter commuted the sentence of execution to life imprisonment.

Respondent's next proceeding was to petition the United States District Court for the Northern District of New York for a writ of habeas corpus. The petition was based upon a claim of coercion in the procurement of the confessions introduced in evidence upon respondent's trial in the State Court.

New York opposed the petition upon two grounds.

The first was that because of the limitation of the issue presented to the Supreme Court in the review heretofore mentioned to the question of the constitutionality of the sentencing statutes and the sentence imposed thereunder upon respondent, he had failed to exhaust his State remedies on the issue of coercion, with the result that that question was not properly before the District Court (*Darr* v. *Burford*,

339 U. S. 200; *Ex Parte Hawk*, 321 U. S. 114). The petition was also opposed on the merits of the coercion issue.

The District Court, being of the opinion that the exhaustion requirement could be dispensed with because of respondent's indigence, passed upon the merits; and, deciding adversely to him, issued an order of denial and dismissal (Foley, D.J., *United States* v. *LaVallee*, 170 F. Supp. 582), but granting a certificate of probable cause.

On the appeal, without considering the merits of the controversy the Court of Appeals affirmed the order of the District Court upon the specific ground that the petitioner had not exhausted his State remedies. *United States* v. *LaVallee*, 276 F. 2d 645.

The Court denied respondent's motion for reargument on April 25, 1960. On December 12, 1960 the United States Supreme Court denied his petition for a writ of certiorari (364 U. S. 922).

The New York Court of Appeals denied respondent's motion for reargument of the original appeal on March 29, 1962 (11 N. Y. 2d 838) and on June 25, 1962, the United States Supreme Court denied the petition for the writ of certiorari which he had presented following the denial of reargument by the New York Court of Appeals (370 U. S. 960).

The petition for the issuance of the writ of habeas corpus, from the denial of which the appeal in the Court below was taken, then followed, with the resultant order of the Court of Appeals for the Second Circuit in reversal, which is the subject of the present petition.

Opinions Below

The District Court opinion is reported in 170 F. S. 582. The opinions of the United States Court of Appeals are reported in 323 F. 2d 65.

Jurisdiction

The jurisdiction of the District Court was invoked by the respondent under Title 28, Section 2254, United States Code. The jurisdiction of this Court is invoked by petitioner under Title 28, Section 2101 c and d, United States Code, and Rule 22 of the Revised Rules of this Court effective July 1, 1954.

Question Presented

Petitioner contends that the United States Court of Appeals erred in its judgment holding inadmissible in evidence confessions made by petitioner to police officials and the District Attorney of Kings County upon the ground that his right of due process had been violated as a matter of law because these confessions were tainted by various coercive practices. It is petitioner's contention that the confessions were voluntarily made and, therefore, constitutionally admissible in evidence against petitioner.

Applicable Constitutional and Statutory Provisions

(1) Constitution of the United States, Fourteenth Amendment, Section 1:

> "* * * Nor shall any State deprive any person of life, liberty or property, without due process of law; * * *"

(2) Constitution of the State of New York, Article 1, Section 6:

> "* * * Nor shall he be compelled in any criminal case to be a witness against himself;
> * * * No person shall be deprived of life, liberty or property without due process of law."

(3) Code of Criminal Procedure of the State of New York (a) Sec. 395:

> "Confession of defendant, when evidence, and its effect.
> A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the District Attorney that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

(b) Sec. 165:

> "Defendant, upon arrest, to be taken before Magistrate.
> The defendant must in all cases be taken before the Magistrate without unnecessary delay; and he may give bail at any hour of the day or night."

Record Facts Material to the Question Presented

The People's Case

PAULA GRAFF, mother of the deceased girl, described the wounded condition of her daughter (169)*, when she was

* References are to folios in the case on appeal in the New York Court of Appeals, a copy of which will be made available to the Court if desired.

discovered upon the mother's return home late in the night of April 19, 1948. Later that month while confronting appellant, she asked him "Why did you kill her?" (176) and he answered "I didn't mean it."

DONALD GRAFF, the ten year old brother of the deceased (253), was awakened from his sleep by his sister's outcry and saw a man assaulting her (266). The assailant also struck the boy (269) who suffered major skull lacerations (436). He described the man as "probably in his twenties" (278) whose head he was able to see (302); but he did not specifically identify appellant. Cross-examination disclosed that he had previously told the police that the assailant was a white man (308). (Respondent is a Negro). The young witness wore glasses and had been treated with respect to his eye sight (330). The sole lighting in the apartment was in the adjacent foyer and the bedroom in which the assault took place "was rather dark" (340).

*However, the jury were left under no misapprehension concerning the lack of probative value in the boy's testimony by the trial prosecutor's statement that " * * * there is no contention by the People that this witness can identify this defendant or that he ever has"* (398).

PATROLMAN ALEXANDER S. KLUGER, the first officer at the Graff home, made a search of the rear yard and there found a flashlight (450). The police also discovered a twig from a tree, or bush, which had been used to hold down the window shade in a bedroom adjacent to that slept in by the deceased girl and her brother (468). In a nearby yard, they found an iron bar (485). The flashlight head was covered by a piece of paper (514). The bar had on it hair

resembling that of the deceased girl (521) and the twig was similar to that from the lilac bush in the rear of the Graff home (543).

Detective Roger Rooney first spoke to respondent in the afternoon of September 8 (569) and then again in the early evening beginning at about 7:00 o'clock. (He had seen respondent in the precinct about 9:00 o'clock that morning (636)). They were then in the police precinct. (The conversation between them was given in evidence at this point pursuant to a waiver by defense counsel of a premiminary *voir dire* and a reservation of their right to move later in the case to strike out any confession.)

Its substance follows: About 11 o'clock in the evening of April 19th, respondent after drinking some liquor and smoking a marijuana cigarette (584) and finding himself penniless, decided to burglarize some premises. He had with him a flashlight around whose bulb he placed a piece of an orange wrapper. After inspecting various premises, he came to one (the Graffs) which he decided to enter by means of an iron bar which he had found in the yard (586). He did so; and when inside, pulled down the window shade and fastened it with a piece of wood (the twig) which he had found in the yard (588). After searching the bureau drawers of that room, he went into an adjacent bedroom where, while searching the dresser drawers, he was struck by a girl whom he in turn struck (590) many times. As he was leaving, he observed "a little man getting up out of another bed" and struck him also. He did not realize that he had killed the girl until he read the next-morning newspaper accounts (592). He then noticed blood stains on his shoes, and being unsatisfied with his attempts to remove them, threw the shoes away in a rubbish can (593).

Respondent admitted the ownership of the flashlight which had been found in the yard (596). He was certain of its identity because of the orange colored paper inside the glass.

The only person present with Detective Rooney during the foregoing conversation was Police Captain Sabatino (599).

The oral confession to the detective was supplemented by respondent's own handwritten confession in which he substantially restated the incidents of the murder. Present at the time of the writing were Detectives Henry Werner and Roger Rooney and Captain Sabatino (606). It was written about 10 o'clock on the evening of Monday, September 8th (699) by respondent of his own free will. The District Attorney did not come to the station house until after this had occurred (700).

Rooney's cross-examination disclosed that respondent was "booked" about 6 o'clock in the morning of Tuesday, September 9th (640). He had been apprehended at about 3 o'clock on the previous morning (643). He was brought to the Felony Court on Tuesday about 10 o'clock in the morning and was there arraigned about Noon after a complaint had been drawn (647). Felony Court was open Sunday morning (648), although not Sunday night (651). The Felony Court was also open Monday morning. Respondent was given food on Monday (659). Rooney saw no marks of physical violence on his face (660), except a purplish "color" on his nose (663). He denied burning respondent with a cigarette (668) and he saw no burns on respondent's body (670). Certain blemishes on respondent's legs disclosed by a photograph were not there when the detective saw him undressed (671, 678). The detective did not

strike respondent (687) or in any way assault him. He did hear respondent shout (689). He saw no other person assault the prisoner (690). He did not suggest the details of respondent's handwritten confession (717-719).

On re-direct examination, Rooney clarified the time factor with respect to respondent's confession to the police. Although he began to talk to the prisoner at about 7:15 P.M. o'clock concerning the flashlight which had been found (820) and did make a reference to the Graff girl (821), it was at about 8:45 P.M. that they began to converse definitely about the killing and between then and 10 o'clock P.M., respondent made his oral confession and began to write out his handwritten confession (821). From 9 o'clock in the morning (of September 8, 1947) on, respondent was provided with food twice (851) up to 9:30 o'clock in the evening.

When Rooney arrived in the precinct at 9 o'clock in the morning, he was ordered by Captain Sabatino not to question the prisoner concerning the Graff killing (856). That order, which he obeyed, was not rescinded until the evening.

Captain James Sabatino arrived at the precinct about 9 o'clock on the morning of September 8th and remained there until midafternoon (871). He returned about 6:30 and in the evening spoke to respondent at about 7 o'clock, and intermittently between that time and 9:15 (883). When he charged Williams with having continuously lied during the day and offered to grant his request (that his mother be sent for) if he would tell the truth, the prisoner agreed to, and did, recount the details of the burglary and murder and his actions subsequent thereto (884-897). Captain

Sabatino testified that his first mention to respondent of the Graff killing was made about 7 o'clock in the evening (897). It was he who had issued the order to his subordinates not to talk to the prisoner concerning the Graff case until later (900). Respondent's mother and stepfather were sent for by the police about 2 o'clock in the afternoon but did not arrive until the evening (907).

Sabatino saw marks on respondent's face (911) but did not see any burns on his body. He did not strike the prisoner, nor did he see anyone do so (915).

On re-direct examination, Sabatino testified that as the morning wore on, he noticed that respondent had difficulty with his legs (1049). Upon inquiry, respondent told him that he suffered from rheumatic fever and asked that a detective be sent to his home to procure medicine which he had there. The detectives were unsuccessful in their quest for it.

JOHN J. CANEVARI, the District Attorney's stenographer verified the accuracy of a typewritten transcript of the confession made by respondent to Assistant District Attorney Perlman on September 9, 1947 beginning about 12:45 A.M. in the presence of seven police officers of varying rank (1245-1386). During the progress of the questioning, respondent went with Mr. Perlman and police officials to various points which he had mentioned as part of his itinerary on the evening of the crime (1345, 1350, 1358) and finally to the scene of the murder (1367). The confession contained a detailed statement of the murder committed during the burglary, including the use of the flashlight, the twig, the iron bar, and finally, the killing (1312). *It is to be noted that the fact of the killing was confessed before the trip of reenactment began* (1345).

Canevari denied under cross-examination that he had been instructed by Mr. Perlman not to take down certain "off the record" matters (1400).

Irving Levine, Selma Graff's brother-in-law, heard his mother-in-law ask respondent "Why did you kill her?" and his answer: "I didn't mean to; I didn't mean to kill her" (1454).

Assistant District Attorney William S. Perlman arrived at the police precinct about midnight of September 8, 1947 (1608) and after talking with Capt. Sabatino for a while directed that the District Attorney stenographer be sent for. He took respondent's confession stenographically and then procured respondent's consent to accompany him to the scene of the homicide (1616). He had promised respondent an opportunity to see his mother before she read newspaper accounts of the crime (1617). On the way to the Graff home, they traversed Williams' itinerary of the murder evening (1619 *seq.*), and in the home, respondent reenacted the homicide (1643-1646). When they returned to the precinct, Mr. Perlman had food sent in for Williams (1647). He asked the prisoner about the limp which he observed and was told that it was due to rheumatic fever (1653). Mr. Perlman had also observed a discoloration of the left eye and a slight swelling of the cheek bone (1658).

When William's mother arrived, the prisoner told her of the killing (1665) but denied an intent to perpetrate it.

Mr. Perlman had also heard Mrs. Graff ask "Why did you kill my Selma?", (1672) and respondent's answer "I didn't mean to do it."

Mr. Perlman's cross-examination disclosed that while he had not asked the prisoner if he had been beaten or other-

wise mistreated, the prisoner had made no complaints of such experiences (1706). Any omissions from the record of questions and answers were on matters which Mr. Perlman did not deem to be important *and occurred after the full confession had been made* (1725). He took respondent's confession without first having seen the written confession to the police (1750). The questions and answers concerning the crime itself were taken "just as you have it on the record" (1732).

Mr. Perlman denied that he had decided "what would be in the statement and what would not be in the statement" (1760). Any omissions from the record came only during the trip about the neighborhood and the reenactment of the crime (1807-1811). The mark which Mr. Perlman observed on respondent's right arm did not appear "to have anything to do with a cigarette. It appeared very natural and normal, something on his skin, his body; the back of his skin, his flesh. That's the way it appeared to me" (1886).

The Defense

Samuel Tito Williams, eighteen years of age, testified in his own behalf (2043). After a recital of his personal history not here material, he testified to the fact of his arrest at about 3 A.M. on September 8th (2066) and his treatment by the police in the station house from the time of his arrival there (2072-2197). This included blows on many parts of his head and body, some with a rubber hose (2142) to the point where he was reduced to unconsciousness several times (2143). He was burned with lighted cigarettes (2172). The fear which this treatment induced

in him (2225), together with the lack of food and sleep (2150) and these experiences,—and these experiences alone,—compelled him to make the confession suggested to him by the police and the District Attorney (2265).

Respondent's recital of the brutalities practiced upon him constituted a veritable category of horror. We do not detail the elements of this narrative because of our confidence that under well established law, hereinafter to be dwelt upon, governing the action of this Court, the issue is not here open. For the same reason we do not refer to his cross-examination, which the jury rightfully accepted as sufficient to disentitle his defense to credence.

Dr. Frank Levine, physician at the Brooklyn City Prison (2664) testified to respondent's condition at the time of his medical examination. It is important to note that the examination was not made until September 11, 1947, two days after respondent's commitment to that institution. The prisoner then showed a sprain of the left ankle with "a little knob on the outer side of the ankle and abrasions on the right shin; also a small circular burn on the back of the left wrist; crushed abrasion on the back of the neck" (2667). A second examination made two months later, on November 12, 1947, showed other slight marks which respondent claimed to have been the result of burns "received prior to admission" (2668). It is equally important to note that although the physician was in the jail at the time of respondent's admission on September 9th, he made no complaint on that or on the following day (2674), although the doctor was present in the institution and available to prisoners (2677). Dr. Levine testified under cross-examination that these marks were all located on portions of respond-

ent's body which could be reached "with his own hand" (2689). The swelling of the ankle might also be caused by a chronic condition of rheumatic fever (2694).

Lawrence J. Krieger, respondent's attorney during the early stages of the proceeding (2738), observed his condition on September 12, 1947. He too saw the marks on the legs, arms (2742), temple, neck (2744) and swelling and discoloration of an eye (2745). At respondent's request, he conveyed a complaint concerning these matters to Judge Leibowitz (2748) before whom respondent had been arraigned that morning (2738).

People's Rebuttal

Detectives Raymond Cullen (2948), Henry Werner (2972), Deputy Chief Inspector Patrick F. Kenny (2985), Captain James Sabatino (2990), Detectives Peter J. Ward (3001) and Roger Rooney (3004) and Patrolman Joseph De Vivo (3029), all testified in rebuttal that neither they nor any one in their presence had subjected respondent to either force or threats.

Morris Wallen, a Correction Officer assigned to the receiving room of the Brooklyn City Prison (3033), was on duty when Williams was admitted to the prison. He asked Williams at the time if he was hurt in any way or wished to see a doctor. The only complaint made was of a swelling of the legs because of rheumatism (3037) and the prisoner stated that he did not wish to see a doctor. He made no complaints concerning police brutality (3039). The officer had noted these facts on the prison records (3050).

DETECTIVE FRANK DE LORENZO was in contact with respondent at the time of his arrest at 2:30 A.M., September 8th. He then noticed that respondent's eyes were puffed and discolored (3067).

The Court's Charge

In the aspects of the case germane to this appeal, the trial Court charged the jury fully and properly under both State and Federal law on the issue of confession (3434-3437):

> "Our law provides that if a police officer fails or refuses to perform the duty of arraigning a defendant without unnecessary delay, that he is guilty of a misdemeanor. It is for you, gentlemen, to determine from the facts in this case whether or not the arraignment of the defendant was unnecessarily and illegally delayed. In determining that question, you must take into consideration all that transpired between the time the defendant was taken into custody and his arraignment.
>
> If, on the basis of all the facts, you believe there was unnecessary and illegal delay, please understand, gentlemen, that you are only to consider this in connection with the question as to whether or not the admissions made by the defendant were to any extent induced by such illegal delay.
>
> If you decide that such confession or admission was made as the result of fear induced by threats, duress, or violence, or induced by unnecessary and illegal delay in arraignment, the confession or admission so obtained cannot be used against the defendant and is to be disregarded even if you believe it to be true. No confession is admissible unless it is voluntary. Its primary meaning imports a condition of

mind that is free and unconstrained by fear, or inspired by false hope or threats or violence, or by illegal and unnecessary delay in arraignment. At any rate, it is a question of fact for you, the jury, to determine. You also must determine and decide, if you do accept such confessions and decide that it was made voluntarily, whether or not the confessions are true. *Of course, if you decide that the confessions were not voluntary or not true, you must acquit the defendant.*" (Italics ours)

The Court clearly summarized the testimony of the People and of the defendant on these issues (3437-3474).

It is notable that when the trial Court asked if there were any requests or exceptions, respondent's eminent and experienced trial counsel answered: "No exceptions" (3491). Moreover, every one of counsel's requests for additional charges were granted and relevant additional instruction given to the jury (3491-3496), including the charge that wilful and unnecessary delay in arraignment constitutes a misdemeanor for which the offending police officers may be prosecuted (3493).

The Supreme Court of the United States has ruled that it is within the competence and discretion of State courts to determine the wording of instructions upon the involuntary character of confession; and if such instructions fairly raise the question, the requirements of due process are satisfied (*Lyons* v. *Oklahoma*, 322 U. S. 596, 88 L. Ed. 1481).

Proceedings in the New York Court of Appeals

On the appeal from the judgment of conviction respondent's brief was limited to two points. One was entitled

"The Confessions were Obtained by Unlawful Methods and were Inadmissible as a Matter of Law". The Court of Appeals by its unanimous affirmance of the judgment rejected this factual claim after its careful scrutiny of the entire record pursuant to its constitutional power in capital cases (New York State Constitution, Article VI, Section 7).

The second point treated of the contention that both the stautes (Penal Law, Sections 1044, 1045, 1045-a and Code Crim. Pro. Section 482), and the practice thereunder of basing the Court's rejection of the jury's clemency recommendation on *ex parte* information, were unconstitutional.

Absent from the brief was the contention made in the United States Court of Appeal that respondent's arraignment in the Kings County Court upon the indictment without the benefit of counsel violated his rights under the Due Process Clause of the Fourteenth Amendment.

ARGUMENT

POINT I

The petition for the writ of habeas corpus was properly denied on the merits. Respondent failed to sustain the burden of proof cast upon him by law.

We have demonstrated in this petition that respondent's contentions in the Federal Courts were identical with his arguments in the State Court of Appeals, resolving themselves into the assertion that his rights to due process under the applicable provisions of the Fourteenth Amendment to the Federal Constitution were violated by the admission into evidence of the confessions made by him.

The unanimous affirmance of the judgment of conviction by the State Court of Appeals and the dismissal by the Federal District Court of the petition for a writ of habeas corpus left the respondent with but one recourse in the United States Court of Appeals of which he has availed himself in full measure and with complete success: to contend that the jury which found him guilty, New York's Court of Appeals and the Federal District Court all erred so completely in their treatment of his confessions that the United States Court of Appeals, sitting in fact as a jury, must reverse. The persuasiveness of this argument is, of course, shown by the judgment of the Court of Appeals in reversal of the District Court. It is our submission that the error of this reversal is patent.

The error of the Court of Appeals, we submit, is that it disregards the decision of this Court in *Stein* v. *New York*, 346 U.S. 156:

> "Since these convictions may rest in whole or in part upon the confessions, we must consider whether they are a constitutionally permissible foundation for a finding of guilt.
>
> Inquiries on which this Court must be satisfied are: (1) Under what circumstances were the confessions obtained? (2) Has the use of the confessions been repugnant to 'that fundamental fairness essential to the very concept of justice'? Lisenba v. California, 314 U.S. 219, 236, 86 L. ed. 166, 179, 62 S. Ct. 280. The first is identical with that litigated before the trial court and jury. The second is within, if not identical with, those questions considered by the state appellate court. As to both questions, we have the identical evidence that was before both state courts. At the threshold of our inquiry, therefore, lies the question: What, if any, weight

do we give the verdict of the jury, the rulings of the trial judge and the determination of the state appellate court?

Petitioners' argument here essentially is that the conclusions of the New York judges and jurors are mistaken and that by reweighing the same evidence we, as a super-jury, should find that the confessions were coerced. *This misapprehends our function and scope of review*, a misconception which may be shared by some state courts with the result that they feel a diminished sense of responsibility for protecting defendants in confession cases.

Of course, this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding. *But that does not mean that we give no weight to the decision below, or approach the record de novo* or with the latitude of choice open to some state appellate courts, such as the New York Court of Appeals. Mr. Justice Brandeis, for this Court, long ago warned that the Fourteenth Amendment does not, in guaranteeing due process, assure immunity from judicial error. Milwaukee Electric R. & Light Co. v. Wisconsin, 252 U.S. 100, 106, 64 L. ed. 476, 480, 40 S. Ct. 306, 10 ALR 892. *It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do, that cause us to intervene to review, in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court.*

It is common courtroom knowledge that extortion of confessions by 'third-degree' methods is charged falsely as well as denied falsely. The practical problem is to separate the true from the false. Primarily,

and in most cases final, responsibility for determining contested facts rests, and must rest, upon state trial and appellate courts.

A jury and the trial judge—knowing local conditions, close to the scene of events, hearing and observing the witnesses and parties—have the same undeniable advantages over any appellate tribunal in determining the charge of coercion of a confession as in determining the main charge of guilt of the crime. *When the issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded facts, decisive respect.*" (Italics ours.)

In the District Court, Dawson, *D.J.* properly followed the spirit of this decision in a procedure authorized by this Court in *Brown* v. *Allen*, 344 U.S. 443. Since respondent offered no new evidence touching on the issue of voluntariness of the confessions, Judge Dawson decided the question by careful study of the record on appeal in the State Court. He accorded that record the weight to which this Court held it to be entitled when in *Brown* v. *Allen*, *supra*, this Court wrote:

"So far as weight to be given the proceedings in the Courts of the State is concerned, a United States District Court, with its familiarity with State practice is in a favorable position to recognize adequate State grounds in denials of relief by said Courts without opinion. A fortiori, where the State action was based on an adequate State ground, no further examination is required, unless no State remedy for the deprivation of Federal constitutional rights ever existed (citing cases). *Furthermore, where*

> *there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the State's resolutions of the issue.* Malinski v. New York, 324 U.S. 401, 404, 89 L. Ed. 1029, 1032, 65 S. Ct. 781. In other circumstances, the State adjudication carries the weight that Federal practice gives to the conclusion of a Court of last resort of another jurisdiction on Federal constitutional issues. It is not res adjudicata." (Italics ours.)
>
> • • • • •
>
> "The decisive and serious responsibility of compelling State conformity to the Constitution by overturning State criminal convictions, should not be exercised without clear evidence of violation."

Nor is there any doubt that he fulfilled his responsibility by examining the record of the trial with meticulous attention to every detail. Such care and scrutiny is revealed by every line of his opinion and justifies his holding that:

> "The issue of coercion was fairly presented to the jury under proper instructions. The function of a Federal Court is not to sit as a super-jury and as such to conclude that the confession was coerced. Stein v. New York, 346 U.S. 156, 180, 73 S. Ct. 1077, 97 L. ed. 1522 (1953)."

The decision in this Court in *Townsend* v. *Sain*, 372 U.S. 293, casts no doubt upon the propriety of the District Court's procedure in dismissing the petition for the writ of habeas corpus on the basis of the State record of trial. The case at bar involved no one of the six types of State trials or hearings which this Court thus summarized in *Townsend, supra*:

> "We hold that a Federal Court must grant a evidentiary hearing to a habeas applicant under the following circumstances: if (1) the merits of the factual dispute were not resolved in the State hearing; (2) the State factual determination is not fairly supported by the record as a whole; (3) the fact finding procedure employed by a State Court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the State Court hearing; or (6) for any reason it appears that the State trier of fact did not afford the habeas applicant a full and fair fact hearing."

It suffices to say, we submit, that the issue of voluntariness of confession was completely developed and resolved upon the State trial, whose record supports the jury's determination and on which respondent had "a full and fair fact hearing". (Certainly no one is a better judge of the fullness and fairness of the trial than Black, *J.*, see page 4 of this brief.)

The question presents itself: Why did the Federal Court of Appeals, on exactly the same record of trial, reach a diametrically opposite result as to the facts?

Put in another fashion: which reviewers of the facts,—or more accurately still, which deciders of the facts,—were correct in their conclusions: the seven Judges of the State Court of Appeals and the Federal District Judge, or the three Judges of the United States Court of Appeals?

We do not even intimate that justice has only a quantitative basis. Nevertheless, the administration of the criminal justice is not a mechanical matter with conclusions mechan-

ically arrived at. In the last analysis, it depends upon human judgment; and that being so, the opinions of the seven Judges of the State Courts and of the District Judge were, we submit, entitled to, but did not, receive from the Federal Court of Appeals that "great and, in the absence of impeachment by conceded facts, decisive respect" which this Court itself feels bound to give to judgments of State Courts (*Stein* v. *New York*, *supra*).

We turn to the two opinions written in the Court below in order to find the answer to this question.

In the opinion written by Smith, *D.J.*, there is acknowledgement that:

> "The record leaves the impression that Williams grossly exaggerated the story of physical abuse."

The ultimate conclusion of the Court rests upon the compendium of factors relating to the length of interrogation, the delay in arraignment, respondent's repudiation of the confessions when finally arraigned, his youth and physical condition, and,—and this seems to have been the strongest influence upon the decision,—the promise to let him see his mother if the confession was forthcoming.

The opinion by Lumbard, *C.J.* adopts the factors set forth in the opinion by his brother Judge, as well as the analogies drawn by Smith, *C.J.* with *Haynes* v. *Washington*, 373 U.S. 503, *Spano* v. *New York*, 360 U.S. 315, *Leyra* v. *Denno*, 347 U.S. 556, *Ashcraft* v. *Tennessee*, 322 U.S. 143, *United States ex rel. Wade* v. *Jackson*, 256 F. 2d 7, cert. den. 357 U.S. 908, *Turner* v. *Pennsylvania*, 338 U.S. 62, *Haley* v. *Ohio*, 332 U.S. 596; *United States ex rel. Caminito* v. *Murphy*, 222 F. 2d 698, cert. den. 350 U.S. 896.

We do not believe that it would be of service to this Court for us to embark upon an exhaustive analysis of these cases, accompanied by a point-to-point distinction between each of them and the case at bar. We content ourselves with an answer which relies strongly upon the language employed by Black, *J.* when the case was first in this Court upon respondent's appeal from the judgment of conviction pursuant to certiorari allowed by the Court (337 U.S. 241). Despite the restricted nature of the litigation then before the Court, Black, *J.* wrote:

> "The narrow contention here makes it unnecessary to set out the facts at length. The record shows a carefully conducted trial lasting more than two weeks in which appellant was represented by three appointed lawyers who conducted his defense with fidelity and zeal. The evidence proved a wholly indefensible murder committed by a person engaged in a burglary * * *.
>
> Appellant was found guilty after a fairly conducted trial * * *."

We do take note of certain specific factors which appear to have been deeply involved in the opinion of Smith, *C.J.* and which we believe disregarded the law on these points as enunciated by this Court. These were (1) the delay in arraignment in violation of New York's Code of Criminal Procedure, Section 165; (2) William's youth and physical condition; (3) the failure to advise respondent of his right to counsel or of his privilege to remain silent (neither of which in a State Court is an obligation of the police or the prosecutor); (4) the "veiled promise" that he would be permitted to see his mother. With great respect to the Court below and its constitutent three members, we submit that their conclusion, so diametrically opposed to the con-

clusions of the seven Judges of the State Court of Appeals and of the District Judge, are contrary to the summary of the law enunciated by this Court, given by Frankfurter, *J.* in *Culombe* v. *Connecticut*, 367 U.S. 568 in which he wrote:

> "But asking questions is not the lash or the rack, and to say that the argument ex necessitate is not the short answer to every situation in which it is invoked is not to dismiss it altogether. Due process does not demand of the States, in their administration of the criminal law, standards of favor to the accused which our civilization, in its most sensitive expression, has never found it practical to adopt. The principle of the Indian Evidence Act which excludes all confessions made to the police or by persons while they are detained by the police has never been accepted in England or in th[illegible] country. Nor has the principle of the Scottish cases barring the use in evidence of a defendant's incriminating responses to police questioning at any time after suspicion has focused on him. Rather, this Court (in cases coming here from the lower federal courts), the courts of England and of Canada, and the courts of all the States have agreed in holding permissible the receipt of confessions secured by the questioning of suspects in custody by crime-detection officials. And, in a long series of cases, this Court has held that the Fourteenth Amendment does not prohibit a State from such detention and examination of a suspect as, under all the circumstances, is found not to be coercive. See Lisenba v. California, 314 U.S. 219, 86 L. ed. 166, 62 S. Ct. 280; Lyons v. Oklahoma, 322 U.S. 596, 88 L. ed. 1481, 64 S. Ct. 208; Gallegos v. Nebraska, 342 U.S. 55, 96 L. ed. 86, 72 S. Ct. 141; Brown v. Allen, 344 U.S. 443, 97 L. ed. 469, 73 S. Ct. 397; Stein v. New York, 346 U.S. 156, 184, 97 L. ed. 1522, 1542, 73 S. Ct. 1077; Crooker v. California, 357 U.S. 433, 2 L. ed.

2d 1448, 78 S. Ct. 1287; Cicenia v. Lagay, 357 U.S. 504, 2 L. ed. 2d 1523, 78 S. Ct. 1297. And see Townsend v. Burke, 334 U.S. 736, 738, 92 L. ed. 1690, 68 S. Ct. 1252."

He continued:

"The McNabb Case was an innovation which derived from our concern and responsibility for fair modes of criminal proceeding in the federal courts. The States, in the large, have not adopted a similar exclusionary principle. And although we adhere unreservedly to McNabb for federal criminal cases, we have not extended its rule to state prosecutions as a requirement of the Fourteenth Amendment. Gallegos v. Nebraska, 342 U.S. 55, 63, 64, 96 L. ed. 86, 93, 94, 72 S. Ct. 141 (opinion of Reed, J.); Brown v. Allen, 344 U.S. 443, 97 L. ed. 469, 499, 73 S. Ct. 397; Stein v. New York, 346 U.S. 156, 187, 188, 97 L. ed. 1522, 1544, 1545, 73 S. Ct. 1077; cf. Lyons v. Oklahoma, 322 U.S. 596, 597, 598, 88 L. ed. 1481, 1483, 1484, 64 S. Ct. 1208, note 2; Townsend v. Burke, 334 U.S. 736, 738, 92 L. ed. 1690, 1692, 68 S. Ct. 1252; Stroble v. California, 343 U.S. 181, 197, 96 L. ed. 872, 884, 72 S. Ct. 599.

In light of our past opinions and in light of the wide divergence of views which men may reasonably maintain concerning the propriety of various police investigative procedures not involving the employment of obvious brutality, this much seems certain: It is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions. No single litmus-paper test for constitutionality impermissible interrogation has been evolved: neither extensive cross-questioning—deprecated by the English judges;

nor undue delay in arraignment—proscribed by McNabb; nor failure to caution a prisoner—enjoined by the Judges' Rules; nor refusal to permit communication with friends and legal counsel at stages in the proceeding when the prisoner is still only a suspect —prohibited by several state statutes. See Lisenba v. California, 314 U.S. 219, 86 L. ed. 166, 62 S. Ct. 280; Crooker v. California, 357 U.S. 433, 2 L. ed. 1448, 78 S. Ct. 1287; Ashdown v. Utah, 357 U.S. 426, 2 L. ed. 2d 1443, 78 S. Ct. 1354.

Each of these factors, in company with all of the surrounding circumstances—the duration and conditions of detention (if the confessor has been detained), the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control—is relevant. The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. Rogers v. Richmond, 365 U.S. 534, 5 L. ed. 2d 760, 81 S. Ct. 735. The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession."

Even in referring to its own constitutional duty to enforce obedience to requirements of due process under the Fourteenth Amendment, this Court has said (*Malinski* v. *New York*, 324 U.S. 401) that:

"We must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws,

> and exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes."

Or as Mr. Justice Frankfurter wrote in *Watts* v. *Indiana*, 338 U.S. 49:

> "Power of such delicacy and import must, of course, be exercised with greatest forbearance."

We are, we submit, in no sense overstating the problem when we say that the sovereignty of the states—of utmost importance under our Federal structure of government—should not be infringed, except upon compelling necessity and clearest proof; and with proof of such kind as rests neither upon inference nor upon the personal *weltanschaung* of a Judge. With great deference to the Court below, it is our submission that in the case at bar, the sovereignty of the State of New York has been thus adversely affected.

It is our prayer therefore, that the writ of certiorari be allowed in order that the State of New York may in this Court have an opportunity to right a wrong decision.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its judgment reversing the denial of respondent's application for a writ of habeas corpus.

Respectfully submitted,

EDWARD S. SILVER
District Attorney, Kings County
Attorney for Petitioner

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel